STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 98-457

December 7, 1998

PUBLIC UTILITIES COMMISSION
Standards of Conduct
for Transmission and Distribution
Utilities and Affiliated
Competitive Electricity Providers
(Chapter 304)

ORDER PROVISIONALLY
ADOPTING RULE AND
STATEMENT OF FACTUAL
AND POLICY BASIS

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. INTRODUCTION

In this Order, we provisionally adopt a rule that governs the standards of conduct for investor-owned transmission and distribution utilities (distribution utilities)[1] and their affiliated competitive electricity providers (ACPs)[2]. This rule also requires consumer-owned utilities (COUs) to notify the Commission of any wholesale sales or generation sales that exceed 5% of the total kilowatt-hours sold at retail by that COU in a 12-month period.

II. BACKGROUND

In May 1997 the Maine Legislature enacted "An Act to Restructure the State's Electric Industry," (the Act) P.L. 1997, ch. 316[3] that provides for retail competition for generation services beginning March 1, 2000. Under the Act, the Legislature permitted current affiliates of investor-owned electric utilities to provide electricity service to consumers within their service territories, but recognized that incumbent utilities would

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[1]In contrast to the other provisions of the Act, Section 3205 uses the term "distribution utility" to describe any investor-owned transmission and distribution utility that has an affiliated competitive electricity provider. The proposed rule, the provisional rule and this Order employ the same terminology to maintain consistency.

[2]Commissioner Nugent dissents to Section IV(F) of this Order, regarding the assignment of the costs associated with policing the standards of conduct. See attached Dissenting Opinion.

[3]The Act is codified at 35-A M.R.S.A. §§ 3201 - 3217.

possess certain advantages over other competitive electricity providers. To promote a new competitive market for generation that would operate fairly and efficiently, the Legislature imposed certain restrictions upon the relationship of the incumbent utilities and their marketing affiliates and charged the Commission with further refining and implementing those restrictions through rules. 35-A M.R.S.A. §§ 3205-3206. Under the Act, the Commission must provisionally adopt such rules by March 1, 1999.

The Act also required the Commission to adopt rules that limit or prohibit competitive providers from selling generation services in Consumer Owned Utilities' (COUs') service territories if allowing such sales would cause the COUs to lose their tax-exempt status.[4] 35-A M.R.S.A. § 3207.[5]

On April 7, 1998 the Commission issued a Notice of Inquiry (NOI) seeking comments on certain aspects of the Act that required further definition for purposes of developing rules. Docket No. 98-099. The Commission received comment from the Public Advocate (OPA);[6] Maine Public Service Company (MPS); Central Maine Power Company (CMP); Bangor Hydro-Electric Company

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[4]The following are the COUs currently operating within Maine: Houlton Water Company (Elec. Dept.); Isle-Au-Haut Electric Power Company; Eastern Maine Electric Cooperative; Matinicus Plantation Electric; Van Buren Light & Power District; Kennebunk Light and Power Company; Swans Island Cooperative; Fox Islands Electric Cooperative; and Town of Madison.

[5]Rules enacting the provisions of both 35-A M.R.S.A. §§ 3205 and 3206 are "major substantive rules" as defined and governed by 5 M.R.S.A. §§ 8071-8074. Therefore, the Commission cannot finally adopt them until it receives authorization from the Legislature. Although rules enacting the provisions of 35-A M.R.S.A. § 3207 are "routine technical" rules pursuant to 5 M.R.S.A. § 8071 and may be finally adopted by the Commission without Legislative authority, all but a small portion of the proposed rule has been designated as major substantive rules. Therefore, the Legislature must review the full provisional rule and authorize its final adoption either by approving it, with or without change or by taking no action. 5 M.R.S.A. § 8072.

[6]The OPA noted that it had consulted with the Industrial Energy Consumers Group, Enron and the Independent Energy Producers of Maine in preparing his comments submitted in response to the NOI.

(BHE); Dirigo Electric Cooperative (Dirigo);[7] and the Edison Electric Institute (EEI).

After considering the comments, the Commission issued a Notice of Rulemaking and proposed rule for comment. Docket No. 98-457 (July 1, 1998). The Commission received comments on the proposed rule from CMP, BHE, MPS, Dirigo, Enron[8] and EEI. On August 19, 1998, the Commission held a technical conference to allow interested persons to provide oral comments and responses to questions regarding their positions. The following interested persons participated in the technical conference: CMP, BHE, MPS, OPA, MainePower, and EEI. On November 30, 1998, the Commission deliberated the provisional rule and Order.

The Commission appreciates the participation of the interested persons in this proceeding and found their comments helpful in developing the provisional rule.

III. GENERAL POLICY CONSIDERATIONS

In enacting the statutory provisions on affiliate marketing and standards of conduct, the Legislature balanced the potential market abuses and unfair competitive advantages of permitting utility affiliates to sell electricity within their respective service territories against providing those affiliates a reasonable opportunity to compete in the new markets.

In developing this rule, we have attempted to implement the marketing provisions of the Act consistently with its language and purpose. We are mindful that the provisions of this rule place restrictions on the relationship between utilities and their marketing affiliates that do not apply to other competitive providers or their affiliates, and that such restrictions may place marketing affiliates at some competitive disadvantage. Without such restrictions, however, affiliates of incumbent distribution utilities could have substantial advantages over their competitors simply by virtue of that affiliation.[9]

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[7]The Dirigo Electric Cooperative is composed of the following Maine COUs: Eastern Maine Electric Cooperative, Fox Islands Electric Cooperative, Houlton Water Company, Kennebunk Light and Power District, Madison Electric Works and Van Buren Light and Power District.

[8]The OPA indicated that it supported Enron’s comments in total. For the remainder of this Order we will, therefore, refer to these as Enron’s comments but presume the OPA also supports them.

[9]Such advantages could include, but are not limited to: 1)

Nothing in this rule is intended to prevent distribution utilities and their ACPs from capitalizing on legitimate economies of scale; that is, the economies that can be realized by virtue of a company's size. For example, if a distribution utility and its ACP can purchase office supplies at a lower per unit cost than a competitor due to the volume of office supplies they purchase, they have achieved an economy of scale. Such economies are not exclusive to utilities and, therefore, do not present an unfair advantage.

Similarly, nothing in this rule is intended to prevent distribution utilities and their ACPs from benefiting from economies of scope, provided such economies are not a result of a company's *status* (as distinct from size) as a utility. For example, if an ACP's distribution utility had a subsidiary that provided cellular phone service, and by virtue of the scope of the two operations (the characteristics of those particular types of companies), the ACP and the cellular phone subsidiary achieved economies, such economies would not reflect an unfair advantage; nothing prevents other competitive providers from joining with a cellular phone company and achieving similar economies. It is the economies an ACP could achieve *by its affiliation with a distribution utility* that would provide an ACP with an unfair advantage over its competitors; these are the only economies the legislation and this rule are intended to prevent.

In adopting strict separation requirements, the Legislature determined that the promotion of a fair and effective competitive market for electricity must be the priority, even though the existence of such restrictions may necessarily be at the expense of legitimate economies that utilities and their affiliates might otherwise enjoy. The restrictions in the Act represent the legislative balance struck between permitting utility affiliates an opportunity to participate in the competitive electricity market and the need to prohibit unfair advantages that incumbent utility affiliates would otherwise possess. The Commission has attempted to maintain that balance faithfully in this rule.

In the Act, the Legislature set forth certain standards of conduct specifically to govern large distribution utilities. 35-A M.R.S.A. § 3205. It did not, however, prescribe specific standards of conduct to govern small distribution utilities but rather directed the Commission to determine through a rulemaking the "extent of separation ... necessary to avoid cross-subsidization and market power abuses." 35-A M.R.S.A. § 3206(2). In our opinion, the concerns regarding standards of conduct for large distribution utilities are generally equally

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established relationships with customers; 2) customer inertia; and 3) access to information unavailable to competitors.

valid for small distribution utilities. Therefore, in this proceeding we have adopted the same standards of conduct for both small and large distribution utilities in most instances.[10]

Finally, this rule provides general requirements applicable to all distribution utilities and their ACPs. If there are specific situations that do not require measures as stringent as those included in the rule, or if there are instances that merit treating small distribution utilities differently from large distribution utilities, those situations can and should be addressed case by case under the waiver provision of the rule.

IV. DISCUSSION OF PROVISIONAL RULE AND COMMENTS

A. Section 1: Purpose of Rule

Section 1 of the proposed rule stated that the purpose of the rule was to establish standards of conduct to govern the relationship and interactions between distribution utilities and their ACPs. We did not receive any comments on this section and have maintained the proposed rule's language in the provisional rule.

We decided, however, that the rule should contain additional language to make explicit that, although the language throughout the rule is expressed in terms of a distribution utility and its ACP, other corporate arrangements may not be used to circumvent the intent of the rule. For example, it would be a violation of this rule for a distribution utility to provide information to an affiliate that was not a competitive provider (e.g., a telecommunications affiliate) if that affiliate subsequently provided the information to an affiliate that was a competitive provider. Therefore, in the provisional rule we added a statement in section 1 to clarify this point.

B. Section 2: Definitions

1. Advertising or Marketing

Advertising or marketing was not defined in the proposed rule. We added this definition to the provisional rule to clarify the types of communication or activity prohibited by section 3(J)(2), the provision that prohibits joint marketing by a distribution utility and its ACP. By focusing on the commercial nature of the message or activity, we hope the

[10]The only exceptions relate to the market share limitations and the penalty provisions. The Legislature did not authorize the Commission to extend these provisions to small distribution utilities under the Act.

definition will reduce disputes over the interpretation of section 3(J)(2).

2. Affiliated Competitive Provider

The proposed rule incorporated the statutory definition of affiliated competitive provider (35-A M.R.S.A. § 3205(1)(A)), except that it broadened the definition to include affiliates of small distribution utilities and clarified that the meaning of "affiliated interest" is as defined in 35-A M.R.S.A. § 707. We received no comments on the proposed rule's definition of ACP, and it is adopted unchanged in the provisional rule.

3. Distribution Utility

The proposed rule incorporated the statutory definition of distribution utility (35-A M.R.S.A. § 3205(1)(B)), except that the proposed rule broadened the definition to include small distribution utilities in addition to large distribution utilities. We received no comments on the proposed rule's definition of distribution utility, and it is adopted unchanged in the provisional rule.

4. Joint Advertising or Marketing

Joint advertising or marketing was not defined in the proposed rule. We added it to the provisional rule to clarify the types of communication or activity prohibited by section 3(J)(2), the provision that prohibits joint marketing by a distribution utility and its ACP. As with the definition of advertising and marketing, our hope is that the addition of this definition will reduce future disputes over the interpretation of the standards of conduct.

5. Large Investor-Owned Distribution Utility

The proposed rule included the statutory definition for large investor-owned distribution utility (35-A M.R.S.A. § 3201(12)), except that it used the term "distribution utility" rather than "transmission and distribution utility" to be consistent with Section 3205 of the Act. We received no comments on the proposed rule's definition of large investor-owned distribution utility, and it is adopted unchanged in the provisional rule.

6. Proprietary Customer Information

Proprietary customer information was defined in the proposed rule to have the same meaning as "customer specific information" in Chapter 820, § 2(D). We received no comments on

the proposed rule's definition of proprietary customer information, and it is adopted unchanged in the provisional rule.

7. Regulated Product or Services

Regulated product or services was not defined in the proposed rule. However, Enron indicated that it should be defined to have the same meaning as "core utility services," defined in Chapter 820, § 2(C). We have adopted the Chapter 820 definition in the provisional rule, except that we omitted the reference to "generation" and "gas transmission and distribution" services since neither of these will be regulated products or services of an electric distribution utility.

8. Small Investor-owned Distribution Utility

The proposed rule included the statutory definition of small investor-owned distribution utility (35-A M.R.S.A. § 3201(16)) except that, as for "large investor-owned distribution utility," it used the term "distribution utility" rather than "transmission and distribution utility" to be consistent with Section 3205 of the Act (see footnote 1). We received no comments on the proposed rule's definition of small investor-owned distribution utility, and it is adopted unchanged in the provisional rule.

C. Section 3: Standards of Conduct

1. Section 3(A): No Preference

Section 3(A) of the proposed rule incorporated the statutory language. It prohibited a distribution utility from giving preferential treatment to its ACP or customers of its ACP when providing any regulated product or service. We received no comments on this section in the proposed rule, and it is adopted unchanged in the provisional rule.

2. Section 3(B): Service Provided Without Discrimination

Section 3(B) of the proposed rule also incorporated the statutory language. It required a distribution utility to make its regulated products and services available to all customers and competitive electricity providers simultaneously and without undue or unreasonable discrimination. We received no comments on this section in the proposed rule, and it is adopted unchanged in the provisional rule.

3. Section 3(C): Posting

Section 3(C) of the proposed rule prohibited a distribution utility from providing regulated products or services to its ACP without either simultaneously posting the offering on its Internet web site or otherwise making a sufficient offering to the market. If the product or service is provided pursuant to the terms of a filed tariff, the proposed rule required no further public offering to the market, allowing the tariff itself to serve as public notice of the availability of the product or service. In any other situation, unless the offering is posted on the utility's web site, the proposed rule required the utility to obtain prior Commission approval for any alternative means of making a sufficient public offering of a product or service. No comments were received on this section in the proposed rule, and it is adopted unchanged in the provisional rule.

4. Section 3(D): Requests for Regulated Products

Section 3(D) of the proposed rule incorporated the statutory language. It required a distribution utility to process all similar requests for a regulated product or service in the same manner, regardless of the identity of the party making the request. Enron commented that the term "regulated products or services" should have the same definition as core utility services in Chapter 820. We adopted this suggestion in the definition section of the rule as discussed previously in this Order. Therefore, the language in section 3(D) of the proposed rule is adopted unchanged in the provisional rule.

5. Section 3(E): No Tying

Section 3(E) of the proposed rule incorporated the statutory language. It prohibited a distribution utility from tying its products, services or rates to the provision of any product or service in which an ACP is involved. No comments were received on this section in the proposed rule, and it is adopted unchanged in the provisional rule.

6. Section 3(F): Request for Information

Section 3(F) of the proposed rule incorporated the statutory language with minor stylistic changes. This section: 1) required a distribution utility to process all similar requests for information in the same manner and within the same time period; 2) prohibited a distribution utility from providing information to an ACP without a request when other competitive providers receive the same information only if they request it; 3) prohibited a distribution utility from providing its ACP with

preferential access to nonpublic information regarding the distribution system or customer-specific information that is not provided to other competitive providers upon request; 4) and required a distribution utility to instruct its employees not to provide any competitive provider with preferential access to nonpublic information. We received no comments on this section in the proposed rule. We have added language to the third point of the provisional rule, however, to clarify that a utility may not provide its affiliate preferential access to *any* nonpublic information it has acquired by virtue of its status as a public utility.

7. Section 3(G): Employees

Section 3(G) of the proposed rule incorporated the statutory language with minor changes. This section prohibited employees of a distribution utility from: 1) sharing with any competitive electricity provider market information obtained from any other competitive provider unless the latter consents to the disclosure, and 2) sharing with any competitive electricity provider any market information developed by the distribution utility in responding to requests for distribution service.

CMP suggested in its comments that the rule should prohibit only the sharing of nonpublic information with competitive electricity providers. We agree with CMP that there would be no harm in allowing distribution utilities to share information that is generally publicly available. Therefore, we have modified this provision such that the provisional rule does not prohibit the sharing of information that is generally publicly available.

8. Section 3(H): Log of Information Requests

Section 3(H) of the provisional rule required each distribution utility to keep a log of all requests for information received from any competitive electricity provider. Under the proposed rule the distribution utility would have been required to: 1) log the nature and date of all requests for information from competitive providers; 2) identify any requests made by the distribution utility's ACP; and 3) describe the date and nature of the distribution utility's response to each request. Under the proposed rule, the log would have been subject to Commission review and have been available to any competitive electricity provider upon request. The proposed rule did not define any categories of information requests so trivial that they would not merit inclusion in the log.

CMP commented that the rule should not require only the ACP to be identified in the log; either all competitive

providers should be identified or none, with CMP's preference being none. CMP also commented that the rule should include more specific information on which types of inquiries do not need to be included in the log, noting that under the proposed rule personal exchanges such as, "how are you?" would technically have to be entered in the log. CMP suggested that requests for publicly available information, requests for information purely personal in nature and requests that do not relate to the provision of a regulated product or service be exempt from the log requirement. CMP also commented that the log should be confidential. At the technical conference, the OPA supported exempting requests of a purely personal nature.

The Legislature enacted the standards of conduct provisions of the Act specifically to guard against potential market abuses and unfair competitive advantages that utility affiliates might have within their respective service territories. Therefore, the log must identify those requests made by the distribution utility's ACP. We are, however, sympathetic to CMP's discomfort at singling out only affiliated providers. Therefore, in the provisional rule we require the name of *any* entity making a request to be identified in the log.

We have also adopted CMP's suggestion to exempt requests of a purely personal nature. Therefore, in the provisional rule we have modified the log requirement to apply only to requests for "commercial" information. We will not, however, adopt CMP's suggestion that the rule exempt requests for information unrelated to the provision of a regulated product or service from the log requirement. To do so could exclude requests for information related to generation, such as information on qualifying facilities that CMP still owns, because generation will arguably no longer be a regulated product of the distribution utility. However, we will narrow the requirement to apply only to requests for information that a distribution utility has obtained by virtue of providing electricity service.[11]

Further, we do not have enough experience in monitoring the standards of conducts of distribution utilities and their ACPs to be comfortable, at this time, with CMP's proposal to exempt public information from the log requirement.

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[11]For example, if a distribution utility has a cellular phone affiliate, a request by a competitive electricity provider for information relating to load profiles of customers would have to be included in the log, but a request by a competitive electricity provider for information regarding cellular phone service would not.

However, we may reexamine these requirements as the Commission and utilities gain experience in keeping the log.

We are also sensitive to CMP's concern regarding the confidentiality of the log. Under the proposed rule, competitive electricity providers would have had access to the log upon request. This open access was intended to promote both the perception and existence of a fair market. However, CMP raised valid concerns that some of the information in the log (e.g. the nature of the request) could include commercially sensitive material. Therefore, in the provisional rule we require the distribution utility to protect the information in the log from being disclosed to any entity, except itself or the Commission.[12] If any other entity seeks access to the information contained in the log, it must file a request for such access with the Commission. At that time, we will determine the appropriate level of protection for the information pursuant to our statutory authority to grant protective orders. 35-A M.R.S.A. § 1311-A.

Finally, as discussed in the Market Power Study Report to the Legislature prepared by the Commission and the Attorney General in Docket No. 97-877 (Market Power Report), we will seek legislative authority to extend the log requirements to other categories of transactions.

9. Section 3(I): Proprietary Customer Information

Section 3(I) of the proposed rule incorporated the statutory language with one minor addition. This section prohibited a distribution utility from releasing proprietary customer information[13] without the prior affirmative written authorization of the affected customer. The proposed rule added to the statutory language the requirement that written authorization be "affirmative." This was done to avoid the use of negative option check-offs or similar blanket authorizations that do not indicate the customer's true subjective intent regarding disclosure of proprietary information.[14]

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[12] The Commission will also protect any such information in its possession from disclosure until it determines such protection is unnecessary.

[13] "Proprietary customer information" is defined in Section 2 as equivalent to "customer specific information" as that term is defined in Chapter 820 of our Rules.

[14] In the comments received in response to our NOI in this matter, (NOI in Docket No. 98-099), some commenters suggested that "customer specific information" was broader than

In its comments, CMP recognized that the language in the proposed rule generally reflected the language in the statute but urged the Commission to seek an amendment to the statutory language to omit the requirement that the authorization be written, rather than oral. It suggested that oral authority could be subject to certain checks (e.g. could require customer T&D account number or third party verification).

The Commission intends to seek an amendment to the legislation that would allow a distribution utility to release a customer's usage information to that customer's competitive provider without written authorization. This amendment is necessary for an efficient retail settlement process. We have modified the language of the provisional rule to be consistent with such legislative change to 35-A M.R.S.A. § 3205(3)(I).

10. Section 3(J): Promotion of Affiliate; Joint Marketing

a. Section 3(J)(1)

Section 3(J)(1)[15] of the proposed rule incorporated the statutory language with minor stylistic changes. It prohibited a distribution utility from giving the appearance of speaking on behalf of, or promoting its ACP. No comments were received on this section in the proposed rule, and we have made only stylistic modifications to the language in the provisional rule.[16]

b. Section 3(J)(2)

This paragraph of the proposed rule prohibited both the distribution utility and the affiliated competitive provider from suggesting there could be any advantages with respect to distribution services as a result of dealing with the ACP. No comments were received on this section

"proprietary customer information." We, however, believe the Chapter 820 definition encompasses all information to which customers may legitimately desire to limit access and adopted it to preserve consistency between Chapter 820 (which governs *all* utility affiliates) and this rule.

[15]The order of the paragraphs under section 3(J) is different in the provisional rule than it was in the proposed rule. This Order refers to the paragraphs as they appear in the provisional rule.

[16]One of the stylistic changes was to move the last sentence of this section to a separate paragraph (section 3(J)(4)).

of the proposed rule, and it is adopted unchanged in the provisional rule.

c. Section 3(J)(3)

This paragraph repeated the statutory prohibition against joint advertising or marketing programs by a distribution utility and its affiliated competitive provider. It also specified that "joint advertising or marketing" includes any use of a name or logo that is sufficiently similar to the distribution utility's name or logo to trigger royalty payments for good will under Chapter 820.

CMP and EEI commented that the Legislature did not intend to prohibit joint use of a corporate name or logo. They also commented that allowing the affiliated competitive provider to use the distribution utility's name and logo provides consumers with truthful and useful information. Further, CMP suggested that prohibiting the affiliate from using the name and logo of its affiliated distribution utility is contrary to the Commission's position in its July 6, 1998 Order in Docket 97-930. EEI commented that it is unlikely that consumers would be harmed by allowing the affiliate to use the distribution utility's name and logo, even if consumers purchase electricity from the affiliate because of the affiliation. Finally, CMP and EEI commented that preventing the affiliated competitive provider from using the distribution utility's name and logo will place the affiliated competitive provider at a disadvantage compared to competitive providers associated with companies with well established and recognized names. At the technical conference, the OPA commented that it agreed with the Commission's interpretation that joint use of a corporate name or logo does constitute joint marketing and is thereby prohibited under the Act, at least within the service territory of the affiliated distribution utility.

We determine that allowing the affiliate to use the name and logo of the distribution utility is prohibited under the statutory language prohibiting joint advertising and marketing. By prohibiting joint advertising and marketing, the Legislature sought to require the separate companies to develop separate public identities and to avoid any inference that a customer might benefit in some way from the companies' relationship. We continue to believe that if the utility and affiliate share a name or logo, every appearance of that name or logo in an advertisement or letterhead will carry a dual meaning to consumers, inextricably linking the companies in a manner that the Legislature clearly meant to prohibit.

Moreover, even if we were to find that the statute did not mandate this result, we would reach the same decision for compelling policy reasons.[17] If a distribution utility and affiliated competitive provider were permitted to use similar names and logos, consumers would inevitably focus upon that connection; that is, in fact, the reason that affiliates choose to use the name of a parent corporation. Some consumers could also assume they would receive better service due to that relationship.

We agree that, all else equal, not allowing ACPs to use the name and logo of their well-known distribution utility could disadvantage them as compared to other competitive providers that are associated with well-known, established companies. However, all else is not equal. Absent restrictions such as this, and the other standard of conduct restrictions, incumbent utilities would have significant inappropriate advantages over their competitors in this fledgling competitive market.[18] It is, therefore, imperative that measures be implemented to ensure the incumbent utility does not possess an unfair advantage in attracting consumers. For this reason, the provisional rule retains the prohibition against affiliates using their distribution utilities' names and logos.

We agree there is likely no harm in allowing distribution utilities and their ACP's to market jointly outside the distribution utility's service territory -- provided it is reasonably unlikely such marketing would be received by the distribution utilities' customers. However, the Act prohibits all joint marketing of any sort. Therefore, the Commission may not have the authority to allow joint marketing, even outside the distribution utilities' service territory.

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[17]CMP is incorrect in its assertion that prohibiting the ACP from using its distribution utility's name and logo is contrary to the Commission's position in Docket No. 97-930. The Commission did indicate that if MainePower (CMP's ACP) were to use CMP's name or logo, it would be required to make a royalty payment pursuant to Chapter 820. Following that statement, the Order noted that, "[a]dvertising or communications designed to create the impression of an association with CMP could also constitute illegal joint advertising and marketing pursuant to 35-A M.R.S.A. § 3205(3)(J)." Docket No. 97-930 (July 6, 1998). The latter statement was somewhat ambiguous because the instant rule -- the rule that will determine whether use of the distribution utility's name and logo by the ACP is illegal joint advertising -- was not final at the time this Order in Docket 97-930 was issued.

[18]This issue is more fully discussed in the Market Power Report.

d. Section 3(J)(4)

This section in the proposed rule was included in the first paragraph of section 3(J) of the proposed rule. It prohibited distribution utilities from promoting their ACP in any manner. No comments were received on this provision. However, to improve clarity we made this a separate paragraph in the provisional rule and made minor stylistic modifications to the language. We also broadened the language to clarify that the ACP is prohibited from promoting a product or service of the distribution utility; such activity would constitute joint marketing.

e. Section 3(J)(5)

This paragraph in the proposed rule required the Commission to maintain a list of competitive electricity providers available to customers in each distribution utility's territory. The proposed rule required that at least every 60 days, the Commission update the list and rearrange the names on the list in a random sequence. Pursuant to the Act, the proposed rule required distribution utility employees to provide a copy of the list to customers who requested information about competitive electricity providers. We received no comments on this provision.

We did modify the provision to specify that the list will be also be provided if a customer asks where it may obtain generation services. Further, we have modified the provision to require that the distribution utility provide customers with the Commission's most recent list of competitive electricity providers. It is likely that this list will be maintained on the Commission's Internet web site and it will be the distribution utility's responsibility to be certain it is providing customers with the most recent version.

f. Section 3(J)(6)

This paragraph of the proposed rule allowed an employee of the distribution utility or the affiliated competitive provider to answer affirmatively if asked if the two entities are affiliated. However, it required the employee to inform the questioner that the affiliate is not regulated by the Commission, that the customer will not gain any advantage by virtue of the affiliate's relationship to the distribution utility, and that the customer may select another competitive provider. The proposed rule required that these disclaimers be provided in conformity with a written script prepared by the distribution utility and submitted as part of the utility's

implementation plan required under Section 5 of the proposed rule.

CMP suggested that this provision should offer more guidance on when a distribution utility may disclose its affiliation and when it may not. Specifically CMP inquired whether a person must use "magic" words, such as "affiliate." The provisional rule clarifies what is allowed, and what is not. A questioner does not need to use the exact word "affiliate," or any other specific word before it is permissible for an employee of the distribution utility or ACP to inform someone it is affiliated with the other entity. However, the nature of the question must be aimed at whether there is an affiliation before such an affirmative reply is permissible. For example, if a person asks a distribution utility employee, "do you sell electricity?" the answer must be no; the distribution utility is no longer involved in providing that service. If, however, a person asks whether the distribution utility is associated with an entity that provides electricity, it is permissible for the employee to answer affirmatively, as long as the qualifiers in subsections 3(J)(4)(a-c) are also communicated pursuant to the rule[19].

11. Section 3(K): No Recommendation

Section 3(K) of the proposed rule incorporated the statutory language with minor stylistic changes. It prohibited employees of a distribution utility from stating any opinion to customers or applicants regarding the capabilities of any competitive electricity provider. We received no comments on this section of the proposed rule, and it is adopted unchanged in the provisional rule.

12. Section 3(L): Sharing of Employee Prohibition

Section 3(L) of the proposed rule dealt with restrictions on the employees of a distribution utility and ACP. The statutory provision (Section 3205(3)(L)) requires that employees of a distribution utility and its ACP must be physically separated from each other. The proposed rule clarified that employees must be located in separate buildings and served by separate telecommunications and computer systems. The proposed rule also clarified the statutory prohibition on sharing employees by stating that an employee is considered to be shared when the employee is directly employed by one entity and,

[19]To the extent distribution utilities or their ACPs believe there are specific instances in which they should be allowed to disclose their affiliation without being asked -- such as meetings or presentations -- they may ask for a waiver of this provision.

during such employment is performing work for another entity. The proposed rule also prevented an employee who was transferred between a distribution utility and an ACP from returning to the former employer for at least one year.

CMP commented that it objected to the broad language of this provision, suggesting that it could be read to prohibit employee sharing between the distribution utility and any affiliate (not only the marketing affiliate), or to prohibit employee sharing between the marketing affiliate and any other affiliate. In CMP's opinion, either of these interpretations is too broad because such employee sharing does not implicate any anti-competitive concerns. CMP suggested the rule should be limited to prohibit sharing only in transactions between the distribution utility and its ACP. It further opined that the rule should simply state that a distribution utility may not use affiliate transactions to circumvent information sharing prohibitions. EEI commented that the rule should prevent intentional sharing of information, not accidental sharing. It stated that the proposed rule would not prevent intentional sharing, but would only increase the cost of the affiliate's operation.

CMP also objected to the restriction on employee transfers in the proposed rule. It questioned the need for the restriction as: 1) there is little danger of illicit information sharing when the employee transfers from the affiliate to the distribution utility; 2) it is unlikely a distribution utility would use such a "revolving door" approach in order to transfer information -- noting that if it tried, it could easily be detected; 3) the benefits to be gained by imposing the limitation in the proposed rule do not outweigh the severe constraint this restriction imposes on the utility (e.g. limiting its ability to react to changing market conditions); and 4) such a restriction limits employee career opportunities. CMP suggested the Commission require periodic reporting on employee transfers as a way to satisfy itself there was nothing improper occurring.

CMP did not object to the separate building requirement of the proposed rule, but did not believe that requiring separate telephone and computer systems was justified. It noted that concerns regarding accidental information sharing could be addressed through other means such as computer passwords and firewalls, separate telephone operators and answering systems. In CMP's opinion, requiring separate systems would needlessly drive up the ACP's cost and prevent ratepayers from benefiting by sharing the costs with the ACP. At the technical conference, MPS indicated that it supported CMP's comments in regard to the separation requirements. In its comments, Enron urged the Commission to prohibit joint utilization of services

that would allow nonpublic information to go from the distribution utility to its ACP, thereby creating an opportunity for unfair competitive advantage and cross-subsidies.

With respect to Enron's and EEI's general concerns, the intent of this section of the rule is to prevent the improper sharing of information between the distribution utility and its ACP; both intentional or unintentional. We have attempted to design the rule in a way that does not make it unnecessarily restrictive but addresses the legitimate concern that ACPs left unfettered might obtain information through shared employees that is unavailable to competitors.

With respect to CMP's first concern, the wording of this section did not prevent a distribution utility from sharing employees with its affiliates that are not competitive providers, nor did it prevent the ACP from sharing employees with other affiliates of the distribution utility[20]. It prevented employees of the distribution utility or an affiliate from performing work for both the distribution utility and the ACP. We have included language in the provisional rule to clarify our intent and to make it explicit that an employee is considered to be shared if the employee performs work for both the distribution utility and its ACP, regardless of the actual employer. This prohibition includes personnel that are employed by either the distribution utility or its ACP as well as personnel employed by neither the distribution utility nor its ACP, such as consultants.

Although not specifically addressed by the Act or this rule, any schemes that tie distribution employees' compensation to the success of an ACP, would concern us. Such schemes could provide perverse incentives for distribution utility employees to violate the standards of conduct provisions and, while not specifically prohibited, would likely be inconsistent with the intent of the Act and the rule. However, because this concern was not raised in the proposed rule; because it would be difficult to define within the rule at what point a distribution utility employee's compensation is tied to the success of an ACP;[21] and because for some levels of employment, such as for upper level management, it may not be inappropriate

[20]While this section included other affiliates in the definition of what constituted employee sharing, the first sentence of the provision prohibited only the sharing of employees between a distribution utility and an ACP.

[21]For example, if the ACP's performance affects the value of the company's stock, any distribution utility employees that have received stock in the company as compensation would be affected by the ACP's performance. However, whether this would provide

for their compensation to be affected by the performance of the ACP, we have not incorporated a provision to address this issue in the proposed rule. However, we will monitor this situation to determine whether further action is necessary.

We do not agree with CMP that it is unnecessary to include restrictions on employee transfers. Employees of a distribution utility have information that may well be of use to a competitive provider. The Legislature prohibited sharing employees to limit this type of information cross-pollination. We do, however, agree with CMP that the cause for concern is much greater when employees transfer from the distribution utility to the ACP rather than from the ACP to the distribution utility. Therefore, we have modified the language in the provisional rule so that employees may transfer from the ACP to the distribution utility at any time, but cannot return to the ACP for at least one year.[22]

We also disagree with CMP's suggestion that the rule should not require separate telephone and computer systems. CMP asserts that other means such as computer passwords and firewalls and separate telephone operators could be used instead. We agree that these types of measures may satisfactorily address information sharing concerns, and it is not our intent to unnecessarily restrict economies in this regard. However, such measures do not lend themselves to being defined on a generic basis. Therefore, we will require distribution utilities or their ACPs to request an exemption under section 3(L)(1) of the provisional rule if they wish to share computer or telephone systems. This procedure will allow the specific separation measures in question to be examined on a case-by-case basis. Assuming the distribution utility or ACP can demonstrate in such a waiver request that appropriate safeguards are in place and that the requirements of 3(L)(1) are met, we would likely support joint use of such facilities.

13. Section 3(M): Books

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sufficient incentive for a distribution utility employee to violate the standard of conduct rules could depend on factors such as: 1) how much effect the ACP's performance has on the company's stock value; and 2) how much stock a particular distribution utility employee owns.

[22]Of course, to the extent the distribution utility or its ACP seeks to share employees in some way or to transfer an employee back to the affiliated competitive provider in a time of less than one year it always has the option to seek an exemption under section 3(L)(1) of the provisional rule.

Section 3(M) of the proposed rule repeated the statutory requirement that distribution utilities and ACPs must keep separate books of account and records. We received no comments on this section, and it is adopted unchanged in the provisional rule.

14. Section 3(N): Dispute Resolution

Section 3(N) of the proposed rule implemented the statutory requirement that a distribution utility establish a dispute resolution process to address complaints alleging violations of 35-A M.R.S.A. §§ 3205, 3206, the applicable provisions of Chapter 820, the distribution utility's implementation plan and the provisional rule. Paragraph 1 of section 3(N) described what must be included in the distribution utility's complaint log. We received no comments on subsections 3(N) or 3(N)(1), and they are adopted with only a minor stylistic change in the provisional rule.

15. Section 3(O): Separate Records

Section 3(O) of the proposed rule repeated the statutory provisions requiring a distribution utility to keep its books of account and records separate from those of its ACP. No comments were received on this section. However, the proposed rule only specified that the Commission had access to the *distribution utility's* books. This is modified in the provisional rule to clarify that the Commission will have access to both the distribution utility's and the ACP's books.

16. Section 3(P): Implementation Plan

Section 3(P) of the proposed rule addressed the distribution utility's implementation plan. It required a distribution utility to file an implementation plan with the Commission. The plan was required to detail the procedures adopted by the distribution utility to ensure compliance with the standards of conduct, including proper training of employees. It further required an up-to-date copy of the implementation plan to be publicly available and given to each employee. We received no comments on this section, and it is adopted with only a minor stylistic change in the provisional rule.

17. Section 3(Q): Notice of Stock Acquisition

Section 3(Q) was not referenced in the statute but was included in the proposed rule. It required a distribution utility to immediately notify the Commission if any entity

acquires 10% or more of its stock or acquires sufficient stock, in combination with previously-owned stock, to achieve 10% ownership after June 26, 1997 (the effective date of the Restructuring Act). This information is needed to enforce the ban on retail sales and possible divestiture provided for in Section 3205(6). In our opinion, the affected utility appears to be in the best position to be aware of any such stock purchase and, therefore, was charged with notifying the Commission if that event occurs. We received no comments on this section, and it is adopted unchanged in the provisional rule.

18. Section 3(R): Compliance with Chapter 820

Section 3(R) was added by the proposed rule. It stated that a distribution utility and its ACP are bound by any applicable provisions of Chapter 820, which regulates the relationship between utilities and affiliates generally.

Enron suggested that the rule should clarify that, if a utility seeks to provide non-core services to an affiliate, the utility must first obtain Commission approval and must price services pursuant to the requirements of Chapter 820. Enron also commented that the distribution utility and its ACP should only be allowed to jointly purchase goods and services not associated with the distribution utility's traditional utility function, and any joint purchases that are allowed should comply with Chapter 820.

With respect to Enron's concerns about joint purchases, assuming a distribution utility and its ACP do not violate any of the provisions in the instant rule or Chapter 820, it is not clear to us that joint purchases of goods and services associated with traditional utility functions would be more or less harmful than any other joint purchases. Therefore, we have not included language in the provisional rule to prohibit such joint purchases.

Further, we believe Enron's concerns regarding Chapter 820 compliance are adequately addressed by the language in the proposed rule that requires distribution utilities and their ACPs to comply with Chapter 820. We have, therefore, not modified the language of the proposed rule in the provisional rule. However, as discussed in the Market Power Report, in the upcoming legislative session we will seek clarification regarding our authority to penalize utilities for cross-subsidization.

D. Section 4: Market Share Limitations

Section 4 of the proposed rule implemented the statutory limitation on the amount of retail sales an ACP is allowed to make. The statute restricts the retail sales made by

an ACP of a large distribution utility to no more than 33% of the total kilowatt-hours sold within its distribution utility's service territory. 35-A M.R.S.A. § 3205(2)(B)(1). This amount includes any sales made by the ACP as part of the territory's standard offer service under Chapter 302. Under Section 3205(2)(B)(2), the ACP is also limited to providing no more than 20% of the standard offer service within the service territory. In the proposed rule, we only included the statutory limit that prohibits an ACP from providing more than 33% of the total kilowatt-hours sold within its distribution utility's service territory in section 4.[23] However, in the provisional rule we have also included the statutory limit that prohibits an ACP from bidding to provide more than 20% of the standard offer services.

1. Section 4(A): Reports

Under Section 4(A) of the proposed rule, each ACP was required to report to the Commission, quarterly and by class, the amount of retail sales it made and the amount of retail sales it contracted for within its distribution utility's service territory. Each distribution utility was required to report to the Commission, quarterly and by class, the total retail sales made within its service territory.

CMP and EEI commented that these reporting requirements were burdensome. CMP suggested the reports should be for a calendar year to be consistent with the market share determination in section 4(B). CMP also commented that reporting by class was unnecessary as sales by class are not relevant to the penalty determination. Further, CMP suggested the rule designate these reports as protected information that do not require individual protective orders.

The requirement that ACPs and distribution utilities report their sales quarterly was included in the proposed rule so the Commission could monitor market developments more closely. However, because CMP and EEI have indicated that quarterly reporting would be burdensome and because only annual information is actually needed to determine compliance with the instant rule, we have removed the quarterly filing requirement. In the provisional rule, we have also clarified that the annual filing will cover the period from January 1st to December 31st of the previous year and will report retail sales and contracted retail sales in terms of kilowatt-hours.

[23] EEI argued against the 33% limitation and urged the Commission to recommend to the Legislature that it be eliminated. The market share limitations is a topic included in the Market Power Report.

The requirement to report sales by class was included in the proposed rule to assist the Commission in monitoring market developments. However, general reporting requirements are governed by the Commission's licensing requirements under Chapter 305. Therefore, we have removed this requirement for ACPs from the instant provisional rule and will rely on the information filed pursuant to Chapter 305.

We will not adopt CMP's suggestion that we include a provision in this rule that would automatically treat reports filed pursuant to this section as confidential information. We will act upon any requests for confidential treatment under our statutory authority to grant protective orders. 35-A M.R.S.A. § 1311-A.

2. Section 4(B): Sanctions

Section 4(B) of the proposed rule provided that an ACP that sold more than 33% of the total retail kilowatt-hours sold in its distribution utility's service territory would be subject to the sanctions included in Section 7 of the proposed rule. We received no comments on this provision. However, in the provisional rule we included language to clarify that the sanctions in Section 7 also apply if an ACP bids to sell more than 20% of the standard-offer service kilowatt-hours in its distribution utility's service territory and that the sanctions for violations of the market share limitations only apply to ACPs of large distribution utilities.

E. Section 5: Implementation Plan

Section 5 of the proposed rule governed the filing of the distribution utility's implementation plan. It required no formal Commission approval of an implementation plan, but allowed the plan to go into effect automatically 30-days after it was filed with the Commission, unless the Commission suspended all or a portion of the plan during that 30-day period. Under the proposed rule, a distribution utility's request for subsequent changes to an implementation plan would be treated similarly. In addition, the proposed rule provided that the Commission could open an investigation, and order changes as a result of that investigation, to a distribution utility's compliance or implementation plan at any time.

Section 3(P) of the proposed rule indicated that the implementation plan must have "detail sufficient to enable customers and the Commission to determine that the company is in compliance with 35-A M.R.S.A. § § 3205, 3206 and this Chapter." At the technical conference, MPS suggested that this section of the rule provide more guidance on what will be acceptable as an

implementation plan; specifically, MPS sought information on how detailed the plan should be.

At this point we cannot provide more guidance than the description in Section 3(P) and will, for now, require the utilities to use their own judgment in developing their implementation plans. Assuming the utilities exercise good judgment, we will not fault them for the level of detail in their initial plans. We expect these implementation plans to evolve, and invite the utilities to consult with the Commission staff as they attempt to define the correct level of detail to include in their implementation plans. As the utilities and the Commission gain more experience in developing and reviewing these plans, we expect the level of detail necessary to demonstrate compliance pursuant to Section 3(P) should become more apparent. However, for now the proposed rule's language is adopted in the provisional rule.[24]

F. Section 6: Audits

Section 6 of the proposed rule required the Commission to conduct audits of distribution utilities and ACPs to ensure compliance with the standards of conduct. For the initial three years following adoption of the rule, the proposed rule provided that audits would be conducted annually. Thereafter, large distribution utilities would be audited at least once every three years and small distribution utilities at least once every five years. Under the proposed rule, the shareholders of the distribution utility would pay for these audits, which could be performed by outside contractors on behalf of the Commission.

In its comments, CMP objected to the audits' being conducted without a showing of need. CMP suggested that compliance with the standards of conduct could adequately be monitored without audits as other competitors would be quick to report violations. CMP also objected to having large distribution utilities and small distribution utilities audited on different intervals following the first three years.

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[24]The proposed rule required distribution utilities with ACPs to have an implementation plan in effect within 30 days after the effective date of this Chapter. Because the Commission could suspend a compliance plan, it might have been impossible for the distribution utilities to have their plans *implemented* within 30 days after the effective date of this Chapter. This section has been modified in the provisional rule to require only that the distribution utilities with ACPs file their implementation plans with the Commission within 30 days after the effective date of this Chapter.

CMP and MPS both objected to imposing the costs of the audits on the shareholders of the distribution utility/ACP. CMP commented that doing so would put the ACP at a disadvantage relative to its competitors as audits will impose a cost its competitors do not have to bear. MPS commented that the cost of the audits should be borne by the distribution utility ratepayers because the ratepayers benefit by the presence of additional competitors in the market. At the technical conference, the OPA argued that the distribution utility/ACP shareholders should pay for the audits because it is these shareholders that reap the benefits of having a marketing affiliate and because without the marketing affiliate there would be no audit costs. Finally, CMP commented that if the requirement for periodic audits is retained in the provisional rule, the rule should limit the audits to a maximum cost of $10,000 and a maximum duration of one week.

We are persuaded by CMP's argument that there is insufficient reason to treat small distribution utilities differently from large distribution utilities. Therefore, in the provisional rule we have modified the audit schedule provision so that both large and small distribution utilities will be audited every three years after the first three years following adoption of this Chapter.

We are not, however, persuaded by CMP's argument that periodic audits are unnecessary because competitors will have an incentive to quickly report violations. First, the construction of this rule may in part influence competitors' decisions to enter the competitive provider market in Maine. It is imperative, particularly in the early stages of this deregulated market, that our rules not suggest the incumbent utility will be allowed unfair advantages over competitors. Audits will help assure competitors that violations of this rule will be detected to the extent possible. Second, even if CMP is correct that competitors will be quick to report standards-of-conduct violations, there are potential violations that will not be apparent to competitors. For example, if the distribution utility improperly provided information to its ACP, it is unlikely competitors would know the violation had occurred. An audit, on the other hand, might uncover such a violation.

We have also eliminated section 6(B), which required the shareholders of the distribution utility to bear the expense of the audits performed under this section. It is our view that in developing the Act, the Legislature allowed distribution utilities to have marketing affiliates, at least in part, because it expected electricity consumers to benefit from having the affiliates active in the electricity supply market. Therefore, as discussed in the Market Power Report, we will recommend

legislation to impose only the cost of "meritorious enforcement proceedings" on shareholders.[25]

Finally, we do not adopt limitations as proposed by CMP on the maximum cost and duration of these audits. While we understand its concern that these audits may be expensive and time consuming,[26] our primary responsibility is to protect ratepayers and electricity consumers from any harm that could occur as a result of the distribution utility's having an ACP. To fulfill this responsibility, we must determine whether the standards of conduct are being followed, and audits appear to be one of the only tools available to assist us in making that determination. However, without any experience in performing or administering such audits, we find it unreasonable to place limits on their scope.

G. Section 7: Sanctions

Section 7 of the proposed rule contained three separate sanctions that could be imposed for violations of the standards of conduct. Section A of the proposed rule authorized the Commission to impose an administrative penalty of up to $10,000 per day for any violation of 35-A M.R.S.A. §§ 3205-3206 of the proposed rule. Section 7(B) provided a specific penalty for violations of the market share limitations imposed on ACPs. If the ACP's market share exceeded 33% but not 35%, the penalty was computed to roughly equal any profit received by the ACP from the excessive sales. If the ACP's sales exceeded 35%, however, the ACP would forfeit *all* revenue from sales in excess of 33%. Finally, section 7(C) restated the statutory provisions governing divestiture of an ACP as a sanction for serious violations. The Commission chose not to further refine the divestiture procedures in the proposed rule and indicated if circumstances warrant divestiture in the future, the process and application would be determined at that time.

Although we received no comments on subsections 7(A) or 7(C) of the proposed rule we have made a minor modifications to them. Under subsections 7(A) and 7(C) of the proposed rule, the administrative and divestiture penalty applied to violations of 35-A M.R.S.A. § 3205 and § 3206. Section 35-A M.R.S.A. § 3206 governs small distribution utilities. As noted earlier, under the Act the Commission does not have the authority to impose the these penalties on small distribution utilities. Therefore we have removed the reference to section 3206 from sections 7(A) and

[25]See attached Dissenting Opinion of Commissioner Nugent.

[26]We assume its concerns are lessened by the elimination of section 6(B).

7(C) of the provisional rule. However, as discussed in the Market Power Report, in the upcoming legislative session we will seek clarification and/or legislative modification to allow the penalty and divestiture provisions to apply to small distribution utilities as well. If such a modification is approved by the Legislature, we would also seek authority to restore these references to sections 7(A) and 7(C).

CMP, the OPA and EEI commented on section 7(B). CMP suggested that for purposes of section 7(B) the market share of an affiliated competitive provider should be determined with respect to the distribution utility's previous year's total kilowatt-hour sales. CMP indicated that this would reduce the uncertainty regarding the amount of sales permitted. CMP also suggested that as long as an ACP made a good faith effort to limit its sales to 33% of the total sales, no penalty should be imposed for sales up to 35% of the total sales. Further, CMP commented that there should be a cure period that would allow the utility to sell more than its limit in a year as long as the provider achieved compliance over a 2-year period.

At the technical conference, the OPA noted that it had no objection to such a 2-year cumulative period for penalty purposes, as suggested by CMP. CMP also objected to the severity of the penalty for sales over 35%, characterizing the penalty as "arbitrary and capricious." It also noted that the penalty for sales over 35% could exceed the maximum penalty authorized by the Act of $10,000 per day. CMP suggested that the penalty for sales over 35% of the total sales should be the profit received for the incremental sales over 33% (or 35% to allow a margin for good faith error) and that if additional punitive penalty is required it should reflect the gross margin on the excess sales, up to $10,000 per day. EEI concurred with CMP's comments on the proposed penalties.

In the provisional rule we have adopted CMP's suggestion that the market share of an ACP should be determined with respect to the distribution utility's previous year's total kilowatt-hour sales. We recognize that under the proposed rule compliance with the 33% limit depends not only on the ACP's own sales for the year but also the total sales within its affiliated distribution utility's territory. To reduce this uncertainty, we will adopt the previous year's total kilowatt-hour sales as the basis to determine compliance with the 33% market share limitation. This mechanism allows the ACPs to know with certainty at the beginning of the year how many kilowatt-hours they may sell but is not biased in any particular direction.[27]

[27]In some years, the ACP would have been allowed to sell more kilowatt-hours using the current year's total sales rather than the previous year's total and in some years it would have been

We have rejected the suggestion that the market share limitations be calculated on a 2-year cumulative basis. By adopting the previous year's total kilowatt-hours as the basis for the market share limitation, we have reduced the uncertainty regarding the maximum level of sales the ACP is allowed to make. We believe additional measures to address uncertainty are unnecessary.

In the provisional rule, we have generally adopted the sanctions for market share violations included in the proposed rule, although we have modified the language of these provisions to clarify the penalty determination methodology and have changed the penalty formula somewhat for sales over 35%.[28] We do not accept CMP's suggestion that the penalty for sales below 35% of the total sales be eliminated. The Legislature was clear that ACPs are not allowed to sell more than 33% of the total sales in their distribution utility's service territory. To impose no penalty for sales up to 35% would effectively increase the limit from 33% to 35% of total sales. In fact, the penalty included in the provisional rule for sales up to 35% is arguably not even a true penalty. The ACP suffers no harm from the "penalty;" it simply loses the profit it made on kilowatt-hour sales above 33%, a profit to which it was never entitled.

We have also rejected CMP's suggestion that the penalty for sales over 35% should only be the incremental profit from kilowatt-hour sales in excess of 35%. As described above, this scheme does not impose any true penalty on the ACP. Under CMP's proposed penalty, the ACP is able to make excess sales with nothing to lose except the profit associated with those sales. The ACP still recovers its costs and retains whatever other benefits it may have acquired by virtue of making the additional sales (e.g. establishing relationships with more customers). Without more meaningful sanctions, ACPs would have strong incentives to sell more than the statutory limit of 33%. The sanction in the provisional rule for sales over 35%, however,

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allowed to sell less.

[28]Under the proposed rule, if an ACP sold more than 35% of the kilowatt-hours sold within its affiliated distribution utility's service territory, it would have forfeited the revenue from all sales in excess of 33%. However, for symmetry with Section (7)(B)(1), under the provisional rule, an ACP that sells more than 35% of the kilowatt-hours sold within its affiliated distribution utility's service territory will forfeit only the profit for sales between 33% and 35%, and will lose the full revenues only for sales above 35%.

provides a powerful incentive for ACPs to limit sales to avoid serious violations.[29]

The Commission is aware that the penalty scheme may, under certain facts, exceed the maximum administrative penalty authorized under Section 3205(5). Therefore, we have added language into the provisional rule that limits this penalty to a maximum of $10,000 per day. Further, under the current language in the Act, each day of a violation is considered a separate offense. Because our rule determines an ACP's market share over an annual term, it is unclear how many days would be considered violations. As discussed in the Market Power Report we will seek clarification and/or legislative modification of these points in the upcoming legislative session. Depending on the outcome at the Legislature, we may need to modify these sections of the rule.

H. Section 8: Consumer-Owned Utilities

Section 8 of the proposed rule was the only provision that applied to COUs. The Act provides that after the beginning of retail access, COUs would be allowed to continue selling electricity to retail consumers within their service territory but would be prohibited from selling electricity outside their service territory, except for incidental wholesale sales necessary to reduce the cost of providing retail service. The Act also requires the Commission to adopt rules that would limit or prohibit the sale of electricity by competitive providers within a COU's service territory if such sales would cause the COU to lose its tax-exempt status under federal or state law.

The proposed rule required any COU to report the details of any wholesale sale or sales of generation that, over any 12-month period, cumulatively exceeded 5% of the total kilowatt-hours sold at retail by the utility over the same period. 35-A M.R.S.A. § 3207. This information is necessary to monitor and enforce Section 3207(1)(B), which permitted wholesale sales only if they are incidental and necessary to reduce the cost of providing retail service. The 5% threshold was intended to eliminate the need to report clearly *de minimis* sales.

The only comment received on this provision was from Dirigo. Dirigo requested that the final order explicitly recognize that the tax exemption issue has not been settled for consumer-owned utilities and that the Commission will continue to

[29] We intend to apply this mechanism as the standard penalty for violations of the 33% market share limitation. However, the Commission has the authority to waive the penalty provision in part, or in full, in the unlikely event that extenuating circumstances warrant doing so.

monitor the situation and, if necessary, will issue an appropriate rule. The Commission does recognize that the tax exempt status is still an open issue for consumer-owned utilities and will modify the rule if necessary.

I. Section 9: Waiver or Exemption

Section 9 of the provisional rule includes the Commission's standard provisions permitting a waiver of the proposed rule's provisions.

V. COMPLIANCE ISSUES

Prior to adoption of this provisional rule, several proceedings have come before the Commission that involved standard of conduct issues: Central Maine Power Company, Application for Approval of Reorganizations under Section 708, of Transactions with Affiliated Interests under Section 707, and of Transfers of Assets under Section 1101 of Title 35-A M.R.S.A., Docket No. 97-930; Central Maine Power Company, Request for Approval of Affiliated Interest Transactions (Application for Approval of Amendments to Services Agreements), Docket No. 98-696; Maine Public Service Company, Request for Approval of Reorganization Approvals and Exemptions and For Affiliated Interest Transaction Approvals, Docket No. 98-138; Maine Public Service Company, Request for Approval of Affiliated Interest Transaction with Energy Atlantic for Accounting and Human Resource Services, Docket No. 98-664; Maine Public Service Company, Petition for Approval of Affiliated Interest Transaction, Docket No. 98-759.

Most of the approvals granted in the above proceedings include a provision that requires compliance with the instant rule when it is final. However, this does not imply that the utilities or their affiliates are required to resubmit the information or requests under the instant rule. The approvals and specific waivers already granted will continue in effect. New waivers, transactions, and situations not specifically addressed in the prior approval process, however, will require the utilities and their affiliates to comply with the instant rule and to seek approval pursuant to it.

Accordingly, we

O R D E R

1. That the attached Chapter 304, Standards of Conduct for Transmission and Distribution Utilities and Affiliated Competitive Electricity Providers, is hereby provisionally adopted;

2. That the Administrative Director shall submit the provisionally adopted rule and related materials to the Legislature for review and authorization for final adoption;

3. That the Administrative Director shall file the provisionally adopted rule and related materials with the Secretary of State; and

4. That the Administrative Director shall send copies of this Order and attached rule to:

a. All electric utilities and their ACPs;

b. All persons who have filed with the Commission within the past year a written request for notices of rulemakings;

c. All persons on the Commission's list of persons who wish to receive notice of all electric restructuring proceedings;

d. All persons who have filed comments in Docket No. 98-457; and

e. The Executive Director of the Legislative Council (20 copies).

Dated at Augusta, Maine this 7th day of December, 1998.

BY ORDER OF THE COMMISSION

_____

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond

Nugent: Concurring in part and dissenting in part. See

attached Dissenting Opinion.

PARTIAL DISSENT OF COMMISSIONER NUGENT

I agree with the majority on the design of this code of conduct rule -- with one exception.

If a transmission and distribution (T&D) utility's shareholders choose to have an affiliate sell any generation beyond standard-offer service within the T&D utility's service territory, I would impose the cost of policing the code of conduct on shareholders -- not on the entire body of the T&D utility's ratepayers.

As the monopoly deliverer of distribution services, a T&D utility is well positioned to either actively or passively aid the success of an affiliate which sells generation competitively.

A T&D utility's close association with an affiliated competitive provider might lead potential competitive energy sellers to view the Maine market as stacked against them, as not a "level playing field." This judgment might cause competitors to shun the Maine market, denying Maine consumers the full benefits of competition.

In addition, protective measures, codes of conduct, will be costly to implement, a cost created solely to benefit the incumbent T&D companies' shareholders, not ratepayers. And, there is no assurance that, despite the Commission's best efforts, the codes of conduct herein proposed will be sufficient to convince competitive providers that they will "get a fair shake" in the Maine market.

I recognize that the Legislature decided to allow an affiliate of a T&D utility to sell power within that T&D utility's service area. But, it is not clear to me that, in so deciding, the Legislature intended that all ratepayers should bear the cost of the measures necessary to protect an emerging competitive market. In my view, the T&D utility's shareholders, as the principal beneficiaries of this arrangement, should bear the costs of policing the relationship between the T&D utility and its affiliated competitive provider.

No such costs would exist if, other than bidding for the standard-offer service, the T&D utility's shareholders deployed their power marketing resources only outside of the T&D service territory in Maine. I do not believe (and the Commission does not recommend) that the T&D's marketing affiliate (if any) be

precluded, as a general principle, from selling generation elsewhere in Maine or, for that matter, anywhere in the world. [It may also be reasonable that a T&D's ACP, if restricted from the non-SO market within its service territory, might have that restriction removed perhaps two or, more likely, four or six years hence, depending on how the market develops.]

While my dissent communicates my belief regarding the proper policy in this matter, it is also intended to invite the Legislature to clarify whether ratepayers or shareholders should bear that cost.